IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 26114 of 2006
With
SPECIAL CIVIL APPLICATION No. 26116 of 2006
With
SPECIAL CIVIL APPLICATION No. 26118 of 2006
With
SPECIAL CIVIL APPLICATION No. 26120 of 2006
With
SPECIAL CIVIL APPLICATION No. 26138 of 2006
With
SPECIAL CIVIL APPLICATION No. 27216 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE K.M.MEHTA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?NO

2 To be referred to the Reporter or not ?NO

3 Whether their Lordships wish to see the fair copy of the judgment ?NO

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?NO

5 Whether it is to be circulated to the civil judge ?NO

==========

JAY VIDEO GAMES & ELECTRICALS - Petitioner(s)
Versus
STATE OF GUJARAT & 2 - Respondent(s)

==========

Appearance :

MR MG NAGARKAR for Petitioner(s) : 1,
MR VINAY S PANDYA, AGP for Respondents.

==========

CORAM : HONOURABLE MR.JUSTICE K.M.MEHTA

Date : 26/12/2006

COMMON ORAL JUDGMENT

1. Jay Video Games & Electricals, petitioner, has filed this petition under Article 227 of the Constitution of India with a prayer that this Court may issue a writ of certiorari or any other appropriate writ, order or direction, for quashing and setting aside the judgment and order dated 28.11.2006 passed by the learned Presiding Officer, Fast Track Court No.2, Rajkot in Civil Misc.Appeal No.82 of 2006. The learned Judge by his impugned judgment and order has vacated the interim injunction granted by the lower court vide order dated 4.6.2005 below application Exh.5 in Regular Civil Suit No.107 of 2005 filed by the plaintiff-petitioner herein and further prayed that this Court may be pleased to restore the order dated 4.6.2005 which is at Annexure “A” to the petition.

2. I have heard Mr.M.G.Nagarkar, learned advocate for the petitioner in Special Civil Application No.26114/06, 26116/06, 26118/06, 26120/06 and

26138/06 and MR.P.S.Gondaliya, learned advocate for the petitioner in Special Civil Application No.27216 of 2006. All these group of matters raises identical question of law and therefore all these matters have been heard together. However, for the sake of brevity and convenience, I will set out the facts of Special Civil Application No.26114 of 2006 which was mainly argued by Mr.Nagarkar in this behalf.

3. All these matters I issue RULE and Mr.Vinay S.Pandya, learned AGP appears and waives service of rule on behalf of respondents in each petition. With consent of both the learned advocates, I take up the matters for final disposal.

3.1 Petitioner is carrying on business in the name and style of Jay Video Games and Electrical and also carrying on business of selling electrical items. It is the case of the petitioner that the Police Commissioner, Rajkot City – respondent No.2 and Police Inspector, “A” Division Police Station, Rajkot – respondent No.3 herein and police officer subordinate to respondents No.2 and 3 decided to harass the petitioner by stating that the petitioner is indulged into gambling activities and that the

same is not permitted under the law and therefore the petitioner should close down business forthwith. The respondent officer also threatened the petitioner that they will file criminal against the petitioner.

3.2 Being aggrieved and dissatisfied with the said action, the petitioner-plaintiff filed Regular Civil Suit No.107 of 2005 before the Court of learned Civil Judge, Rajkot for a declaration and injunction restraining the respondents from not harassing in any manner and making attempts to stop the business of the petitioner. They also prayed that the respondent authorities may not file false complaint against the petitioner in an illegal manner. Along with the suit, the petitioner also filed injunction application Exh.5 praying same reliefs pending the hearing and final disposal of the suit and for a declaration that the respondents No.2 and 3 have no right or authority to file criminal complaint against the petitioner in illegal manner and also for permanent injunction restraining the respondents from taking away the machines which are lying in the shop of the petitioner.

3.3 In the said suit, the respondents who are

defendants therein filed reply which is at Exh.13 which is on page 27 of the paper book. The plaintiff also filed rejoinder at Exh.14 on page 30. The plaintiff also filed written submissions before the learned Judge in this behalf. The Public Prosecutor also filed written submissions.

3.4 The learned 8th Additional Senior Civil Judge, Rajkot by his judgment and order dated 4.6.2005 after going through the provisions of Shops and Establishments Act, 1948 and also recording registration of business of video which was renewed from time to time and also copy of licence issued by the authority to the plaintiff regarding purpose of video games, the learned Judge held that when the plaintiff has a licence of carrying on business of video games which is a valid licence, the plaintiff has a prima facie in this behalf and the defendant who has submitted that they have power to close down the business and if the business is closed down at the interim stage then plaintiff would suffer irreparable loss, injury and hardship which cannot be compensated in terms of money and thereby the learned Judge has allowed the application of the plaintiff Exh.5 and the learned trial Judge held that the

defendants are restrained from carrying on the legal business of the Video Parlour by the plaintiff and from interfering and obstructing or restraining unnecessary in it by the defendants and also defendants are ordered and restrained from taking Video-parlour illegally from the plaintiff and the defendants also restrained to carrying on by the legal business of Video-Parlour till the final decision of the suit. However, the learned Judge by his impugned order also clarified that if the plaintiff may found to defendants in carrying on his business illegally, in the manner which falls under any of the law in the illegal manner, then defendants shall be entitled to act according to law liberally by way of following the provisions of the law in existence.

3.5 Being aggrieved and dissatisfied with the said judgment and order, the original defendants-respondents herein have filed appeal being Civil Misc.Appeal No.82 of 2006 before the Court of Presiding Officer, Fast Track Court No.2, Rajkot.

3.6 The Presiding Officer, Fast Track Court No.2, Rajkot by his impugned judgment and order dated

28.11.2006 pleased to allow the appeal of the defendant and held that the order dated 4.6.2005 passed by the learned 8th Additional Senior Civil Judge, Rajkot below Exh.5 in Regular Civil Suit No.107 of 2005 is hereby set aside and interim injunction granted by that order is vacated forthwith.

3.7 Being aggrieved and dissatisfied with the said judgment and order of the learned Judge, the petitioner has filed present petition before this Court under Article 227 of the Constitution of India for which I have already stated in this behalf.

Contention of Mr.Nagarkar, learned advocate for the petitioner:

4. The learned advocate has submitted that petitioner is only permitting the customers to play video games by charging Rs.1 and they have been provided token for playing games in video machines and by inserting tokens in the machines they are playing video games. All the machines are electrical machines and the games also sharpens the reflaxes, intelligence of the players. Moreover the petitioner

is also not charging any entry fees from any person who desires to enter into game parlour. He further submitted that the video games machines are not instruments of gambling on which one can play gambling. On the contrary, the video games are meant for skill and intelligence and it also increases them. He further submitted that the machines on which video games are being played are such which can neither be termed as machines on which gambling can be played, nor it can be said that the same are instruments of gambling. He further submitted that the machines which are used in the video parlour of the petitioner are used for the purpose of game and the game is mere skill and is nothing but source of entertainment and amusement for the general public and it cannot be used for game of chance or game of chance and skill combined. In the said video games, there are computerized chips so attached in the respective video game machine is activated and the game starts and the player by his sufficient knowledge and experience and by practice can control the game on his own and there is no interference outwardly whatsoever. The video games located in the petitioner's video parlour are nothing but for the entertainment and therefore cannot be said to be a

gambling activity.

4.1 In support of the aforesaid contention, the learned advocate has made following submissions.

4.2 Mr.Nagarkar, learned advocate for the petitioner has stated that word `gambling' is defined under Black's Law Dictionary, Sixth Edition page 679, as under:

4.2A "Gambling :- Making a bet. Such occurs when there is a chance for profit if a player is skillful and lucky. A play for value against an uncertain event in hope of gaining something of value. It involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of a consideration, an element of chance, and a reward. The elements of gambling are payment of a price for a chance to win a prize."

4.3 He has also relied upon definition of `Gambling device' which provides tangible means, instrument, contrivance, or thing with or by which money may be lost or won, as distinguished from the

game itself. A machine, implement, or contrivance of any kind for the playing of an unlawful game of chance or hazard.

4.4 He has also relied upon definition of `Gambling place' which provides any place, room, building, vehicle, vessel, tent or location which is used for making and settling bets, receiving, holding, recording or forwarding bets or offers to bet; conducting lotteries or policy games, playing games of chance for money or other property; or playing gambling devices.

4.5 For distinguishing mere game and gambling he has relied upon the following judgments particularly Constitution Bench judgment of the Hon'ble Apex Court in the case of State of Bombay Vs. R.M.D.Chamarbaughwala and another reported in AIR 1957 SC 699. In para 18 on page 708 the Hon'ble Supreme Court has observed as under:-

4.6 “... It will suffice to say that we agree with the Court of Appeal that a competition in order to avoid the stigma of gambling must depend to a substantial degree upon the

exercise of skill. Therefore, a competition success wherein does not depend to a substantial degree upon the exercise of skill is now recognised to be a gambling nature."

4.7 He has also relied upon para 42 on page 720 of the same judgment where the Hon'ble Supreme Court has observed like this:-

4.8 "We are, however, clearly of opinion that gambling whatever else may or may not be regarded as falling within the meaning of these words, gambling cannot certainly be taken as one of them. We are convinced and satisfied that the real purpose of Arts.19(1)(g) and 301 could not possibly have been to guarantee or declare the freedom of gambling. Gambling activities from their very nature and in essence are extra-commercium although the external forms, formalities and instruments of trade may be employed and they are not protected either by Art.19(1)(g) or Art.301 of our Constitution."

4.9 Similar principle has also been laid down by

the Hon'ble Apex Court in the case of The State of Andhra Pradesh Vs. K.Satyanarayana and others reported in AIR 1968 SC 825 particularly para 12 on page 828 the Hon'ble Supreme Court has observed like this:-

4.9A “We cannot, therefore, say that the game of Rummy is a game of entire chance. It is mainly and preponderantly a game of skill. The chance in Rummy is of the same character as the chance in a deal at a game of bridge. In fact in all games in which cards are shuffled and dealt out there is an element of chance because the distribution of the cards is not according to any set pattern but is dependent upon how the cards find their place in the shuffled pack. From this alone it cannot be aid that Rummy is a game of chance and there is no skill involved in it. Of course, if there is evidence of gambling in some other way or that the owner of the house or the club is making a profit or gain from the game of Rummy or any other game played for stakes, the offence may be brought home. In this case, these elements are missing and therefore we think that the High Court was right

in accepting the reference as it did."

4.10 He has also relied upon judgment of Hon'ble Apex Court in the case of M.J.Sivani vs. State of Karnataka reported in AIR 1995 SC 1770 particularly para 17 of the said judgment where the Hon'ble Apex Court has given the list of video game machines which can be said to be instrument of gambling.

4.10A "The report further disclosed that one player by name Ramesh lost rupees one lakh in video games who was also examined by the committee. The machines are not freely accessible or easily visible to a casual visitor. At some places, they were installed behind partition and the players are conducted into such places with a view to ensuring that such games are not visible from outside. There is no scope for using one's skill to arrive at a desired result in the games like Royal Casino, Super Continental, Five Line, High Low, Black Jack, Pocker Double Up, Skill Ball, Pac Man and Golden Derby. They were classified as games of chance. By allowing such games, the innocent children and the common public would lose hard

earned money. Machines electronically operated are adjusted in such a way that the player always lost the game since no skill is involved. Machines were tampered with, so that chances of winning by the player was almost an impossibility. The Commissioner, therefore, had prohibited such games of chance while permitting to play the games of skill."

4.10B He has also relied upon para 20 on page 1775 of the aforesaid judgment which reads as under:

"It is true that the owner or person in charge of the video game, earn livelihood assured under Article 21 of the Constitution but no one has right to play with the credulity of the general public or the career of the young and impressive age school or college going children by operating unregulated video games. If its exhibition is found obnoxious or injurious to public welfare, it would be permissible to impose total prohibition under Article 19(2) of Constitution."

4.11 Over and above he has also relied upon the

order the Hon'ble Apex Court in the case K.L.Mansukhani Vs. Sanjay Pandey and others dated 29.11.1996 decided in Special Leave to Appeal (Cr.) No.1347-1349/96 where the Hon'ble Apex Court has passed the interim order as under:-

> “Leave granted. Pending further orders of this Court, the operation of the impugned judgment shall remain stayed and the respondents are also restrained from initiating any action against the petitioner under the provisions of Bombay Prevention of Gambling Act, except in accordance with law.”

4.12 The learned advocate for petitioner, therefore, submitted that the aforesaid order has also been relied upon by Bombay High Court in Criminal Writ Petition No.1235 of 1997 (Coram: A.P.Shah (as he was then) & J.A.Bhatt, JJ.) in the case of K.L.Masukhani Vs. Sr.Inspector of Police and others, Mumbai wherein the Division Bench of the Bombay High Court heard the matters and passed th following order:

4.13 “Prima facie we are satisfied that the

prosecution launched by the respondents in LAG No.1588 of 1997 is in defiance of the interim directions of the Supreme Court dated 29th Nov.1996, passed in Special Leave to Appeal (Cri.) No.1347-1349 of 1996. We are also prima facie satisfied that no offence of gambling has been made out. We find considerable merit in the maintain of the petitioner that the present case is covered by the decision of the learned Single Judge of this Court (Coram: M.L.Dudhat, J.) in Criminal Writ Petition No.580 of 1988 (Kumar A.Kadar Vs. V.k.Saraf and Ors.) decided on 22nd Oct.1992. Hence, rule, returnable on 27th Jan,1998. To be placed High on board."

4.14 "The respondents are direction to return the video machines and other articles excluding the cash amount seized under panchnama dated 17th Oct.1997 to the petitioner subject to the petitioner executing a bond in the sum of Rs.1,00,000/-."

4.15 Similarly, a petition was filed before the Rajasthan High Court at Jodhpur Bench being S.B.Criminal Misc.Petition No.284 of 2000 wherein the

Division Bench of Rajasthan High Court in the case of Tulsi Ram V. State of Rajasthan has held as under:

4.16 “In view of the above judgments, the Court is of the considered opinion that the said video game is a game of mere skill as distinguished from game of chance or game of chance and skill combined. In the said video games, there are computerised chips which is the sole source of the such video games and on pressing the relevant button, the computerized chips so attached in the respective video game machines is activated and the game starts and the player by his sufficient knowledge and experience and by practice can control on his own and there is no interference outwardly whatsoever. The video games located in the said parlour is nothing but for the entertainment and, therefore, saved by Section 12 of the Ordinance.”

4.17 Consequently, the Division Bench quashed the complaint and ordered to return the video game machines seized by the police to the petitioner forthwith.

4.18 Being aggrieved and dissatisfied with by the above-referred judgment and order passed by the Division Bench of Rajasthan High Court in the case of Tulsi Ram and others, the State of Rajasthan preferred Special Leave to Appeal (Cri.) M.P.No.572 of 2002 before the Hon'ble Supreme Court and the Hon'ble Supreme Court dismissed the SLP by order dated 31.1.2003 confirming the judgment and order passed by the Division Bench of Rajasthan High Court in the above referred decision which has attained finality.

5. In view of the aforesaid submission the learned advocate submitted that in view of all these authorities the order of the appellate court vacating interim relief is not in accordance with law and this Court must uphold the order of the trial court.

6. On the other hand, the learned AGP Mr.Vinay Pandya has stated that the order of the appellate court is right and the appellate court has given cogent and convincing reasons by vacating interim relief in this behalf.

7. Mr.Nagarkar submitted that in this case in view of the interim order of the appellate court appeal is already disposed of but the suit is still pending and there are large number of matters are pending in this behalf.

8. In view of the aforesaid facts and circumstances of the case this Court is of the view that it is not proper to arrive at any finding at this stage because for deciding the matter both the plaintiffs and defendants will have to led oral and documentary evidence in this behalf. The plaintiff will have to led evidence regarding nature of machines as to whether playing of machine involved any element of the skill, attention, care or not or it only depend upon the chance and there is no element of the skill. These are the questions of fact to be decided by the trial court in this behalf after both the plaintiffs and defendants led their oral and documentary evidence. In view of the same, without deciding the merits of the matter, this Court is of the view that, if following directions are issued, the same will be in the interest of justice.

(i) The impugned order dated 28.11.2006

passed by the learned Presiding Officer, Fast Track Court No.2, Rajkot in respective Civil Misc. Appeals are hereby quashed and set aside.

(ii) The learned trial Judge is requested to hear and dispose of entire suit on merits of the matter after plaintiffs and defendants both led oral and documentary evidence in this behalf. This Court hopes and trusts that the learned trial Judge will hear the suit filed by the petitioner in each petition in accordance with law.

(iii) It may be noted that this Court has not expressed any opinion on the merits of the matter and the trial court is requested to hear and dispose of the matters in accordance with law without being influenced by any observations made by this Court.

(iv) The learned trial Judge is requested to hear and decide the suits, as expeditiously as possible, preferably by 30th April, 2007.

Till the suit is finally heard and disposed of, the interim injunction granted by the the trial court below application Exh.5 in respective civil suits will continue.

9. With the aforesaid observations and directions, these petitions are disposed of. Rule is partly made absolute to the aforesaid extent with no order as to costs.

(K.M. MEHTA, J.)

syed/raman